IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 83 of 2002
With
CIVIL APPLICATION NO. 336 OF 2002

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE N.G.NANDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : YES

SAVITABEN,D/O SHAMJIBHAI ZALA & W/O BABUBHAI WADODARA
Versus
BABUBHAI PUNABHAI WADODARA

Appearance:
1. First Appeal No. 83 of 2002
MR AR LAKHIA for Petitioner No. 1
MR UTPAL M PANCHAL for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE N.G.NANDI

Date of decision: 21/01/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

1. This appeal was listed before us on 18-1-2002. On that day learned counsel Shri. Vyas for respondent appearing on caveat filed sick note, therefore it was kept today. Today, in place of Shri. Vyas, learned counsel Shri. Utpal Panchal appeared for the respondent husband.

2. Admit. Learned counsel Shri. Panchal for respondent-husband waives service of notice. At the joint request of learned counsel for the parties, this appeal is heard and decided today.

3. Respondent-husband Babubhai Punabhai Wadodara filed H.M.P. No. 355 of 1996 against his wife - present appellant/ Savitaben before the Court of City Civil Judge, Ahmedabad, seeking decree of divorce, on the ground of desertion by his wife. Notice was ordered to be issued in that petition and after service of notice the appellant-wife appeared before the learned Judge and applied for adjournment through her advocate. However, thereafter, learned advocate appearing for the appellant-wife did not file his appearance and after adjourning the matter from time to time, learned Judge allowed the divorce petition and by a decree dated 27-3-1997 dissolved the marriage of the petitioner and respondent solemnised on 12-5-1977, and declared that the relationship of husband & wife between them does not exist from that day onwards and it was put to an end.

4. As soon as she came to know about such an ex-parte decree, she filed Restoration Application No. 134 of 1999 (old) on 15-10-1998, which was re-numbered as Civil Misc. Application No. 1150 of 2000 before the Court of Family Judge, Court No.1, Ahmedabad, for setting aside the same on the grounds mentioned in it, which is discussed by the Family Judge on 13-12-2001. Hence this appeal.

5. Learned counsel Shri. Lakhia appearing for the appellant-wife vehemently submitted that, Learned Judge was wholly in error in dismissing the restoration application. He submitted that, Learned Judge ought to have considered the fact that the appellant-wife is totally an illiterate woman and she became the victim of negligence of her advocate, who after applying for adjournment at first instance before Learned Judge of City Civil Court, never appeared before the Court nor he informed the appellant-wife that he is not appearing for her. He submitted that, ex-parte decree came to be

passed on 27-3-1997, but as soon as she came to know about the same, she immediately made an application for restoration on 15-10-1998. There was a delay of more than 19 months, but the Learned Judge himself had condoned the delay in filing the same late. Thus, when the Learned Judge himself had condoned the delay, then, he ought to have allowed restoration application and restored the H.M.P. on file. He submitted that, in the instant case the appellant-wife had filed maintenance application before the competent Criminal Court at Rajkot which was allowed by Learned Magistrate, against which the respondent-husband filed revision petition before the Sessions Court, which was dismissed and in Special Criminal Application, after issuing notice to the appellant-wife, this Court also dismissed the same. He further submitted that, as a counter blast the respondent-husband filed Criminal Complaint under section 406 I.P.C. in 1994, i.e. after filing of the maintenance application,in which she has been acquitted. He, therefore, submitted that the appellant-wife was all through out vigilant about other proceedings filed by and against her husband and appeared in all the proceedings, including H.M.P. proceedings, but unfortunately she was totally helpless in this case as her advocate before the City Civil Court failed to remain present before the Court, and not informed her about the Court's proceedings He, therefore, submitted that, Learned Judge ought to have set aside the ex-parte judgment & decree passed by the Learned Judge and restored the same to the file and after giving full opportunity to the appellant-wife, he should have decided the matter on merits.

6. However, learned counsel Shri. Panchal appearing for respondent-husband vehemently submitted that, while dismissing the restoration application, learned Judge has not committed any error which calls for interference by this Court in this appeal. He submitted that, while dismissing the restoration application, learned Judge has given cogent reasons, and rightly held that the wife was totally negligent and failed to make out the case that she was suffering from any disease as she had not produced any certificate of the doctor in support of her case, that she was sick. He further submitted that, learned Judge has rightly observed that, she was coming to Ahmedabad even after the ex parte decree passed on 27-3-1997, but she never bothered to inquire about her case. In that view of the matter, learned Judge refused to exercise his discretion in the matter, therefore, this Court should not interfere with such order in this appeal.

7. Before appreciating the rival contentions raised by learned counsel for the parties, we may state that under Hindu Marriage Act, it is the duty of the Presiding Officer to first make his sincere efforts of conciliation between the parties, which was not done in this case which is clear from the ex parte impugned judgment & order. In the instant case, at first instance notice was issued on the petition filed by the husband for divorce and after service of notice respondent -wife appeared through her advocate and prayed for time, but unfortunately thereafter her advocate for the reasons best known to him had never remain present before the Court and allowed the Learned Judge to pass ex-pate decree against appellant-wife. If the advocate had informed the appellant-wife at any time and if she had not remain present before the Court, then, perhaps Learned Judge would have been justified in passing the ex parte decree, but that is not the case here. This important aspect of the case has not at all been considered by learned Judge while deciding the restoring application.

8. It is true that, after passing of the ex parte decree on 27-3-1997, appellant-wife was attending the Criminal Court at Ahemdabad in a complaint filed by respondent-husband for offence under section 406 I.P.C. against her. However, learned Judge failed to appreciate that how she would come to know about the proceedings going on against her unless and until she is informed about it. In fact after service of notice, when she first appeared and applied for adjournment through her advocate and thereafter,if her advocate was not remaining present, then, in our considered opinion it was the duty of the learned Judge to issue fresh notice to the wife calling upon her to either remain personally present or through advocate, which was not done in this case.

9. It appears that, learned Judge was very much impressed by the fact that present appellant-wife was appearing before the Criminal Court at Ahmedabad in a complaint filed by her husband under section 406 I.P.C. and on that he has refused the application, not relying upon her say that she was constantly remaining sick and bed ridden, therefore she could not remain present before the Civil Court in HMP proceedings. However, in our opinion, Learned Judge has completely ignored the fact that in a complaint filed against her she was accused for the offence under section 406 I.P.C. and if she would not remain present then, the Court may even issue non-bailable warrant, and under compulsion, though sick, she had to remain present before the Criminal Court. But

on such ground he should not have drawn adverse inference and rejected her application. We must state that, Hon'ble Supreme Court has time & again observed that the Court should do substantial justice and not technical one. In this type of cases at the most by awarding some cost learned Judge could have restored the HMP by granting restoration application of the applicant-wife. In our considered opinion the reasoning assigned by learned Judge for rejecting restoration application are wholly unsustainable.

10. For the reasons stated above, the impugned judgment & order passed by learned Principal Judge, Family Court No.1, Ahmedabad, dated 13-12-2001 in Civil Misc. Application No. 1150 of 2000 (old restoration application No. 134 of 1999) of City Civil Court, Ahmedabad, is hereby quashed and set aside, and the restoration application is allowed. Accordingly, the impugned judgment & decree dated 27-3-1997 passed by Learned Judge, Court No.19, City Civil Court, Ahmedabad in H.M.P. No. 355 of 1996 is also quashed and set aside and it is restored to the file. Learned Judge of Family Court, Court No.1, Ahmedabad, is now directed to decide the H.M.P No. 355 of 1996 in accordance with law, after extending an opportunity of hearing and adducing evidence to both the parties.

11. At this stage, learned counsel Shri. Panchal for respondent-husband requests for time bound programme for disposal of the case before the Family Judge. We do not know the present position before the trial Court. He can make such request before the Learned Judge taking up such matters. We are sure that, as and when such request is made before the Learned Judge, he will consider and decide the same in accordance with law.

12. Accordingly this appeal is allowed, but there shall be no order as to costs.

13. Civil Application No. 336 of 2002 is disposed of in view of the order passed in main First Appeal, with no order as to costs.

Dt: 21-1-2002 (B.J. Shethna, J)

(N.G. Nandi, J)

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